STATE OF MICHIGAN

JOYCE MCDOWELL, as Personal Representative of the estates of BLAKE BROWN, JOYCE BROWN, and CHRISTOPHER BROWN, deceased, and as Conservator of JONATHON FISH, JOANNE CAMPBELL, and JUANITA FISH,

Plaintiffs-Appellees/~~Cross-Appellants,~~

v

CITY OF DETROIT and the DETROIT HOUSING COMMISSION,

Defendants-Appellants/~~Cross-Appellees.~~

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Wayne Circuit Court
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NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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ORDER APPEALED AND RELIEF SOUGHT

This is a personal injury and wrongful death action arising out of a December 1, 2000, fire which occurred on premises owned by Defendant DETROIT HOUSING COMMISSION and leased to Plaintiff JOANNE CAMPBELL. Six children were killed and two other persons were injured.

The lawsuit was filed on December 6, 2000, five days after the fire. Therefore, this Court's decision in Pohutski v City of Allen Park, 465 Mich 675 (2002), does not apply to the instant case. The scope of Defendants' liability is defined by Hadfield v Oakland County Drain Commissioner, 430 Mich 139 (1988).

On March 15, 2001, Plaintiff filed a First Amended Complaint (Appendix C). That pleading included counts for nuisance per se (Count I), nuisance (Count II), trespass (Count III), breach of contract (Count IV), breach of express and implied warranties of habitability and quiet enjoyment (Count V), and violation of the Housing Code (Count VI).

On November 5, 2002, Defendants filed a Motion for Summary Disposition on the grounds, inter alia, of governmental immunity. On December 6, 2002, Plaintiff filed her response. A hearing was held on December 11, 2002. On December 18, 2002, the trial court, Hon. Edward Thomas, denied Defendants' motion in all respects save two: (1) He dismissed Count VI; and (2) He ruled that the operation of the DHC is not a propriety function. An order to that effect was entered January 17, 2003.

On January 22, 2003, Defendants filed a Claim of Appeal to the Court of Appeals pursuant to MCR 7.202(7)(a)(v).

In a published opinion issued November 9, 2004, the Court of Appeals, per Judges Donofrio, White, and Talbot, held that Plaintiffs should be allowed to proceed on the theories of "negligent nuisance" and trespass-nuisance.

Defendants seek a decision from this Court reversing that aspect of the Court of Appeals decision and dismissing Plaintiffs' claims in their entirety because: (1) "Negligent nuisance" is not and never has been an exception to governmental immunity; and (2) The fire originated in the leased premises; therefore, there is no factual basis for a claim of trespass-nuisance.

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STATEMENT OF QUESTIONS PRESENTED

I. IS NEGLIGENT NUISANCE AN EXCEPTION TO GOVERNMENTAL IMMUNITY.

The trial court did not address this issue.

The Court of Appeals answered, "Yes".

Plaintiffs-Appellees contend the answer should be, "Yes".

Defendants-Appellants contend the answer should be, "No".

II. WILL THE FACTS ALLEGED IN THE INSTANT CASE SUPPORT A CLAIM OF TRESPASS-NUISANCE?

The trial court answered, "Yes".

The Court of Appeals answered, "Yes".

Plaintiff-Appellee contends the answer should be, "Yes".

Defendants-Appellants contend the answer should be, "No".

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STATEMENT OF JURISDICTIONAL BASIS

On January 17, 2003, the trial court entered an order denying governmental immunity to Defendants. (Record). Defendants filed a Claim of Appeal to the Court of Appeals on January 22, 2003. (Record). The Court of Appeals issued its opinion on November 9, 2004. Defendants timely appeal from that opinion. This Court has jurisdiction by virtue of MCR 7.301(A)(2).

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STATEMENT OF STANDARD OF REVIEW

This Court reviews decisions on summary disposition de novo. Smith v Globe Life Ins Co, 460 Mich 446 (1999).

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STATEMENT OF FACTS

This is a wrongful death and personal injury action which arises out of a December 1, 2000, fire in which six children died and two other persons were injured. Defendants interposed the defense of governmental immunity. Defendants appeal from the Court of Appeals' holding that Plaintiffs may recover on theories of negligent nuisance and trespass-nuisance. The pertinent facts follow.

Historical Facts[1]

On July 22, 1999, JO-ANN CAMPBELL entered into a Dwelling Lease (Appendix A)[2] with the DETROIT HOUSING COMMISSION for property at 2537 St. Antoine, Detroit.

Beginning in June 2000, MS. CAMPBELL repeatedly complained of problems with the electricity and furnace. (Complaint [Appendix B], ¶9; First Amended Complaint [Appendix C], ¶6). The repairs were not made. (Appendix B, ¶10; Appendix C, ¶11).

On December 1, 2000, MS. CAMPBELL's apartment was occupied by herself, her three minor children, her sister JUANITA FISH, and her sister's four minor children. (Appendix C, ¶6). MS.

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[1]This account accepts as true the factual allegations of Plaintiffs' Complaint (except as contradicted by other material), and accepts Plaintiffs' version of the facts as documented by other material submitted to the trial court. Maiden v Rozwood, 461 Mich 109, 119-20 (1999).

[2]Appendix A was attached as Exhibit C to Defendants' Motion for Summary Disposition and as Exhibit 2 to Plaintiffs' response thereto.

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CAMPBELL left the apartment at approximately 9:00 a.m. (Id., ¶7).

At approximately 10:00 a.m., a fire broke out in the apartment. (Id., ¶8). According to Plaintiffs' expert, the fire was caused by an electrical defect which ignited insulating materials in the wall space. (CHURCHWARD Dep [Appendix D], p 46).[3] As a result, six of the children were killed, and MS. FISH and one of her children were injured. (Appendix B, ¶13; Appendix C, ¶11).

The Trial Court Litigation

On December 6, 2000, five days after the fire, Plaintiffs filed their Complaint (Appendix B). (Docket Sheet, No. 1). The Complaint alleged a single count of negligence.

On March 15, 2001, Plaintiffs filed a First Amended Complaint (Appendix C). That pleading included counts for nuisance per se (Count I), nuisance (Count II), trespass (Count III), breach of contract (Count IV), breach of express and implied warranties of habitability and quiet enjoyment (Count V), and violation of the housing code (Count VI).

On November 5, 2002, Defendants filed a Motion for Summary Disposition on the grounds, inter alia, of governmental immunity. (Docket Sheet, No. 167). On December 6, 2002, Plaintiffs filed

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[3]MR. CHURCHWARD's deposition transcript was attached as Exhibit 4 to Plaintiff's Response to Defendants' Motion for Summary Disposition. Defendants contest MR. CHURCHWARD's opinion. (See Defendants' Supplemental Answer to Plaintiff's First Interrogatories [Appendix E], attached as Exhibit E to Defendants' Motion for Summary Disposition). However, for purposes of this appeal, Defendants accept Plaintiffs' version of the occurrence.

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their response. (Docket Sheet, No. 172). A hearing was held on December 11, 2002. (12/11/02 Tr). On December 18, 2002, the trial court, Hon. Edward Thomas, denied Defendants' motion in all respects save two: (1) He dismissed Count VI; and (2) He ruled that the operation of the DHC is not a propriety function. (12/18/02 Tr, p 5). An order to that effect was entered January 17, 2003. (Record).

The Appeal

On January 22, 2003, Defendants filed a Claim of Appeal to the Court of Appeals pursuant to MCR 7.202(7)(a)(v). Plaintiffs cross-appealed.

On November 9, 2004, the Court of Appeals, per Judges Donofrio, White, and Talbot, issued a published opinion (Appendix F). The panel held that the trial court erred by refusing to grant summary disposition on Plaintiffs' claims of nuisance per se (Count I.), trespass (Count III.), and the contract claims (Counts IV.-V.). (Id., p 5, 7-8, 9-10). The Court also held that the trial court correctly granted summary disposition on the count alleging violation of the Housing Code (Issue VI.), and on Plaintiffs' argument that Defendants were engaged in a proprietary function. (Id., p 10-13).[4]

However, the panel also held that Plaintiffs could recover on theories of "negligent nuisance" and trespass-nuisance.

[4]Judge White concurred in result only.

(Appendix F, p 6-7, 8-9). The basis for those rulings will be discussed below.

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I. NEGLIGENT NUISANCE IS NOT AN EXCEPTION TO GOVERNMENTAL IMMUNITY.

This issue comes to this Court in a rather bizarre posture. For reasons which will be presently apparent, Plaintiffs -- who are represented by highly competent appellate counsel -- did not argue that negligent nuisance is an exception to governmental immunity as defined in Hadfield v Oakland County Drain Commissioners, 430 Mich 139 (1988). The Court of Appeals concocted that proposition on its own.

Accordingly, there is no lower court discussion of the issue and, therefore, nowhere to document that this argument is "preserved". The starting point must be the Court of Appeals opinion. In the following discussion, Defendants will first set forth and then refute the Court of Appeals' analysis.

Court of Appeals' Analysis

Having held that Plaintiffs' claim of nuisance per se failed for lack of an adequate factual basis (Appendix F, p 5), the Court of Appeals identified "nuisance in fact" as an exception to governmental immunity. (Id., p 6). The panel then recognized that nuisance in fact has two categories: negligent nuisance and intentional nuisance. (Id.). The panel relied predominantly on Rosario v City of Lansing, 403 Mich 124 (1978), Gerzeski v Department of State Highways, 403 Mich 149 (1978), and Wagner v Regency Inn Corp, 186 Mich App 158 (1990).

The panel then wrote:

> "**At issue in the instant case is negligent nuisance**. Accordingly, **plaintiffs need** not **establish**

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> intent, but **only a violation of some duty owed to plaintiffs**. Clearly, defendants have duties at law including compliance with the implied warranty of habitability to maintain the premises in reasonable repair as set forth in MCL 554.139 of the real and personal property code, and MCL 125.538 which makes unlawful the maintenance of dangerous buildings. Additionally, defendants have a contract duty under the express terms of the written lease agreement between the parties to '[r]epair and maintain the dwelling unit . . . in decent, safe and sanitary condition' pursuant to Section VII. A. 1. a. of the lease. Further, defendants have a contract duty to '[m]aintain electrical . . . supplied or required to be supplied by Management in good and safe working order and condition' under Section VII. A. 1. d. of the lease. Hence **we have identified at least three duties defendants owed to plaintiffs. Whether defendants** actually **breached any** or all **of these duties, is a question of fact for the jury**.
>
> "Regarding the nuisance itself, although the electrical wiring was capable of being maintained in such a way as not to pose any nuisance, and therefore, we concluded that plaintiffs did not present a claim of nuisance per se, we do not come to a similar result when reviewing nuisance in fact. In reviewing the allegations and record evidence, **we are unable to conclude that defendants were free of negligence** in the creation of a dangerous condition that was the proximate cause of the occurrence."

(Appendix F, p 6-7) (emphasis added) (footnote omitted).

On its face, the panel is discussing nothing more than a simple negligence cause of action. It is no surprise that allowing such a cause of action as an exception to governmental immunity is absolutely unfounded in the decisions of this Court.

Discussion

To provide the necessary context for this discussion, we must start with this Court's prospectivity ruling in Pohutski v City of Allen Park, 465 Mich 675 (2002):

> "Accordingly, this decision will be applied only to cases brought on or after April 2, 2002. In all cases currently pending, **the interpretation set forth in *Hadfield* will apply**."

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Id. at 699 (emphasis added).

With that as the starting point, Defendants will demonstrate that the Court of Appeals' analysis is directly contrary to three of this Court's decisions.

Hadfield

Pursuant to Pohutski, we must look to the scope of the exceptions to governmental immunity which Hadfield defined as viable. Reasoned analysis of the opinions in that case will demonstrate that this Court rejected negligent nuisance as an exception to governmental immunity.

Justice Brickley, writing for himself and for Justices Reilly and Cavanagh, said:

> "In response to the primary question, we hold that there is a limited trespass-nuisance exception to governmental immunity. . . .
>
> "Employing the same historical standard, **we reject other versions of the nuisance exception that are unsupported in the relevant case law**. Having found some historical evidence of a nuisance per se exception and of a limited public nuisance exception, we leave for another day the question whether such exceptions are sufficiently supported by precedent so as to exist independent of trespass-nuisance and, if so, the issue of their proper scope."
>
> * * * *
>
> "Having found that an historical approach is mandated by the second sentence of §7 of the governmental tort liability act, **it is clear that the various versions of the 'intentional nuisance' exception, which were formulated in *Rosario* and *Gerzeski*, are not encompassed by the legislative intent of that provision. There is no pre-1964 case law that recognizes or applies either an 'intentional' or a 'negligent' nuisance exception, in any form**."

Id. at 145, 170 (emphasis added).

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Justice Boyle, writing for herself and Justice Levin, agreed with much of the analysis, noting her specific disagreements. Id. at 208. In particular, Justices Boyle and Levin would hold that nuisance per se and public nuisance (not limited to the invasion of a property right) also constitute exceptions to governmental immunity. Id. at 207.

Justice Boyle's opinion contains no language indicating that she would recognize negligent nuisance as an exception. In fact, her only reference to it suggests the contrary:

> "In other words, **unlike the nuisance in fact**, nuisance per se is not predicated on the want of care, but is unreasonable by its very nature. Accordingly, '[i]n the few instances wherein the Legislature or this Court may label a condition or activity patently unreasonable by its very nature, the state may not circumvent its liability in connection with the situation or operation by raising the shield of governmental immunity.' *Gerzeski v State Hwy Dep't*, 403 Mich 149, 169; 268 NW2d 525 (1978) (RYAN, J., dissenting). To hold otherwise would allow the state an absolute right to use its property in any manner it may choose without regard to the public at large or private persons. *Id.*
>
> "Therefore, while I concur in the result and much of the analysis, I respectfully disagree, as indicated."

Id. at 208 (emphasis added).

In sum, Justices Brickley, Reilly, and Cavanagh expressly rejected the entire Rosario/Gerzeski analysis. Justices Boyle and Levin concurred in that portion of the opinion, disagreeing only as to the plurality opinion's failure to include nuisance per se and public nuisance. Thus, negligent nuisance was rejected in Hadfield as an exception to governmental immunity.

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Rosario and Gerzeski

Any doubt as to Hadfield's rejection of the negligent nuisance exception should be eliminated by reference to this Court's prior decisions in Rosario/Gerzeski. Reasoned analysis of those cases demonstrates that the majority of this Court unequivocally rejected negligent nuisance as an exception to governmental immunity.

In Rosario, Justice Fitzgerald, writing for himself and Justices Cavanagh and Levin, held that nuisance in fact constituted an exception to governmental immunity. 403 Mich at 137-38.

Justice Moody, writing for himself and Justice Williams, limited the exception to intentional nuisance:

> "In [Gerzeski], my opinion stated that when a nuisance in fact is alleged, whether or not the particular thing or act creates a nuisance is a question of fact to be determined by the trier of fact. If the trier of fact finds the existence of a nuisance in fact, the trier of fact must then determine whether the nuisance in fact was created negligently or intentionally. **When the trier of fact determines that the alleged nuisance was intentional, governmental immunity is not a bar.**"

403 Mich at 124 (emphasis added).

Justices Ryan and Coleman did not recognize an exception for intentional or negligent nuisance, but only for nuisance per se and for "intruding nuisance". Id. at 144-48.

In Gerzeski, the companion case to Rosario, the Justices split the same way on the issue. 403 Mich at 154 (Fitzgerald), 160-61 (Moody), 168-71 (Ryan). Justice Moody wrote:

> "One can only glean that **governmental immunity is a bar** to liability for 'want of care and maintenance', **to negligently created nuisances**, while not a bar to liability for governmental activity which creates a nuisance per se."
>
> * * * *
>
> "Accordingly, **the bar of governmental immunity is inapplicable when** a trier of fact determines as in this case, that **the alleged nuisance was intentional**, *i.e., that the governmental agency intended to bring about the conditions which are in fact found to be a nuisance.*"

Id. at 160, 162 (emphasis added).

As noted, with Justices Ryan and Coleman also rejecting nuisance as a cause of action, Gerzeski, like Rosario, is an express repudiation by this Court of negligent nuisance exception to governmental immunity.

In sum, in the instant case, the Court of Appeals failed to cite Hadfield, which it was bound to follow, and failed to follow Rosario/Gerzeski, which it cited. In holding that Plaintiffs can proceed on a theory of negligent nuisance -- which Plaintiffs did not even argue -- the Court of Appeals acted in direct contravention of the only governing case law. This Court should not countenance exposing Defendants to a multi-million dollar verdict on a theory which is not viable.

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II. AS A MATTER OF LAW, THE FACTS ALLEGED IN THE INSTANT CASE WILL NOT SUPPORT A CLAIM OF TRESPASS-NUISANCE BECAUSE THE FIRE STARTED ON THE TENANT'S PREMISES.

The essence of the trespass-nuisance exception is a **physical intrusion onto the plaintiffs' land**. In Hadfield, supra, this Court made that clear a number of times:

> "Trespass-nuisance shall be defined as a direct trespass upon, or the interference with the use or enjoyment of, land that results from a **physical intrusion** caused by, or under the control of, a governmental entity."

430 Mich at 145 (emphasis added).

> "Justice RYAN described **intruding nuisances** as 'situations wherein damage is caused by the **direct trespass** of an instrumentality *from government-owned land* **onto private property**.' [Citation omitted]. We do not adopt the source limitation on the exception that might be inferred from the emphasized language of Justice RYAN's opinion."

Id. at 154 n 7 (italics in original) (other emphasis added).

> "The earliest cases to recognize governmental liability involved some type of **direct invasion** by the government entity **of the plaintiffs' land**. **The actions** were characterized either as trespass or nuisance, but **invariably focused on the aspect of direct, physical invasion**. This focus stemmed from the primary rationale imposing liability: The 'Taking' Clause of the constitution, beginning in Const 1835, art 1, §19, and continuing through out present constitution, Const 1963, art 10, §2, guarantees that the property rights of citizens are protected from government taking 'without just compensation.' **Trespassatory invasions** that stops short of being 'takings' of property were considered actions for which governmental entities should not escape liability."

Id. at 154-55 (emphasis added).[5]

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[5]Justices Boyle and Levin concurred in Justice Brickley's opinion as far as it went, but also argued for additional exceptions. However, there was no majority for anything other than Justice Brickley's discussion of trespass-nuisance.

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Every case cited and analyzed in Hadfield involved physical intrusion onto the plaintiffs' property. Pennoyer v City of Saginaw, 8 Mich 534 (1860) (surface water thrown on plaintiff's land); Sheldon v Village of Kalamazoo, 24 Mich 383 (1872) (physical entry and destruction of fences); Ashley v City of Port Huron, 35 Mich 296 (1877) (casting water on plaintiff's premises); Rice v Flint, 67 Mich 401 (1887) (grade change causing flooding onto plaintiff's land); Seaman v City of Marshall, 116 Mich 327 (1898) (sewer causing water accumulation on plaintiff's property); Ferris v Board of Education of Detroit, 122 Mich 315 (1899) (ice and snow falling onto plaintiff's property); Attorney General ex rel Township of Wyoming v City of Grand Rapids, 175 Mich 503 (1913) (sewage cast on plaintiff's land); Donaldson v City of Marshall, 247 Mich 357 (1929) (drain causing accumulation of water on plaintiff's land); Robinson v Wyoming Township, 312 Mich 14 (1945) (damages caused by flooding resulting from failure of defendant's dam); Rogers v Kent Board of County Road Commissioners, 319 Mich 661 (1948) (installation of metal post on plaintiff's property); Defent v City of Detroit, 327 Mich 254 (1950) (maintenance of active sewer under plaintiff's land); Herro v Chippewa County Road Commissioners, 368 Mich 263 (1962) (water impounded by defendant flooding onto plaintiff's property).

The Hadfield Court characterized those cases as follows:

> "Generalizing from these early cases, it appears that where an **invasion or intrusion onto a plaintiff's**

> **land** occurred, the defendants were often found liable, regardless of whether the municipality acted directly, through an order perhaps, or whether its agents acted intentionally or negligently to produce the invasion. **Consideration of the effect** (**the invasion**), rather than of the act that caused the effect, **continued to be the primary focus through the 1950's**."

430 Mich at 161-62 (emphasis added).

It is thus beyond question that a physical intrusion onto the plaintiff's premises is an essential element of trespass-nuisance. E.g., Bronson v Oscoda Township (On Second Remand), 188 Mich App 679, 683 (1991), lv den, 440 Mich 877 (1992). That element is absent in the instant case.

In the trial court, Plaintiffs expressly disavowed any theory that the electricity was the intruding condition and focused exclusively on the fire itself:

> "Defendants' claim that Plaintiffs' had characterized the trespass as the entry of the electricity onto the premises is false. Fairly read, what Plaintiffs have alleged is that the electricity coupled with the defective wiring or receptacle led to the fire that started in the wall. Nonetheless, **the fire itself is the condition and cause that satisfies the first two elements, not the electricity**."

(Plaintiff's Response to Motion for Summary Disposition, p 18) (emphasis added). Thus, Plaintiffs can recover only if the interstitial space between the outer and inner walls was not part of the demised premises.

Plaintiffs simply asserted that the fire originated in "the wall of the premises that was owned by Defendants" and "Defendants' wall". (Plaintiffs' Brief on Appeal, p 9-10). They cited no authority to support that proposition. That is because the pertinent case law holds that absent a specific reservation, a

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lease includes both the inner and outer walls as part of the demised premises.

In Forbes v Gorman, 159 Mich 291 (1909), the dispute involved the scope of the tenant's right to place signage on the outside of the leased premises. In the course of its analysis, this Court said:

> "The lease of a building, or of one floor or story thereof, conveys to the lessee the absolute dominion over the premises leased, **including the outer as well as the inner walls**."

Id. at 294 (emphasis added).

The Court of Appeals has rejected the very argument advanced by Plaintiffs in a virtually indistinguishable case. In Morris v Fredenburg, Court of Appeals No. 186186 (rel'd 10/25/96; unpublished) (Appendix G), a fire ignited in the upstairs apartment of a two-story house owned by the defendant. The defendant obtained summary disposition on the ground, inter alia, of lack of knowledge of the wiring defect which caused the fire. Id. at 1. As an alternative argument, the plaintiff maintained that the space between the walls was a common area for which the defendant was responsible pursuant to MCL 554.139.

The Court of Appeals, per now-Chief Justice Corrigan and now-Justice Taylor, held that "the trial court appropriately ruled, without regard to the statute, that the wiring space between the walls and above the ceiling was not, as a matter of law, a common area." Id. at 3.

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That holding is in accord with the common law rule that in the absence of language in a lease, the exterior walls of the premises are part of the demise to the lessee. E.g., 400 North Rush, Inc v D J Bielzoff Products Co, 347 Ill App 123, 106 NE2d 208, 210 (1952); Hilburn v Huntsman, 187 Ky 701, 220 SW 528 (1920); Needle v Scheinberg, 187 Md 169, 49 A2d 334, 336 (1946); Kretzer Realty Co v Thomas Cusak Co, 196 Mo App 596, 190 SW 1011, 1013 (1916); Nyer v Munoz-Mendoza, 385 Mass 184, 430 NE2d 1214, 1216 (1982); 265 Tremont Street, Inc v Hamilburg, 321 Mass 353, 73 NE2d 828, 832 (1947); Bee Bldg Co v Peters Trust Co, 106 Neb 294, 183 NW 302, 303 (1921). That necessarily includes the "interstitial" area between the inside and outside walls.

As in the previous issue, the Court of Appeals resolved the question by inventing an argument not even advanced by Plaintiffs. Specifically, the panel ruled that in the lease, Defendants had specifically maintained possession of the interstitial wall space:

> "In making determinations relative to 'cause' or 'physical intrusion' in this case, we must engage in a discussion of the interstitial space between the walls of the premises. We have studied the written lease between the parties and conclude that the interstitial space between the walls of the premises belongs to the lessor. **The language of the lease specifically provides that** the lessee resident agree to 'make no alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of the Management.' The plain language of the contract indicates that **the lessees had no control over even the interior of the premises, let alone control over the interstitial space between the walls**. **Accordingly**, under our plain reading of the lease agreement, **the interstitial space is totally within the control of the**

lessor and not subject to intervention by the lessee as a matter of law."

(Appendix F, p 8-9) (emphasis added).

The emphasized portion of that discussion, which is the linchpin of the panel's analysis, is facially suspect. Not many leases deny the tenant any control over the premises. Neither does the one involved here. To characterize the Court's reading of the lease as "selective" is a monumental understatement.

The Court of Appeals premised its analysis on the following provision in the lease:

> "**1. General.** Resident, including Resident's household, guests, or others whom the Resident controls, shall comply with the following rules. Resident understands that Resident is responsible for all acts committed by Resident's household or guests or others whom the Resident controls and for requiring Resident's household and guests to comply with the same:"
>
> * * * *
>
> "g. **To make no alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management**. To make no changes to locks or install new locks or anti-theft devices without written consent of Management. However, in the event Resident changes the locks, Resident shall provide Management with a key within ten (10) days. Otherwise, Resident will be charged for damage or expenses incurred because of Management's necessary entry into the dwelling unit."

(Appendix A, p 9 of 15) (emphasis added).

That limited restriction on the tenant's right to alter the premises says nothing about her right to control the premises. A number of other provisions in the lease -- including the one immediately preceding the one selected by the Court of Appeals --

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make clear that the tenant had exclusive right to the use and occupancy of the premises:

> "Management hereby leases the Premises **for the exclusive use and occupancy by the following authorized members of Resident's Household listed below** . . ."
>
> * * * *
>
> "Resident and Resident's Household shall have the **exclusive right to occupy the leased Premises**, which shall include reasonable accommodation of Resident's guests or visitors who may not reside with Resident for longer than fifteen (15) days."
>
> * * * *
>
> "f. To keep the Premises and such other areas and grounds **as may be assigned for his/her exclusive use** in a clean and safe condition."

(Appendix A, p 1 of 15, 4 of 15, 9 of 15) (emphasis added).

The lease contains no language limiting the demise to less than that dictated by the common law. So strong is the common law presumption that even a lease provision forbidding signs on exterior walls without the lessor's permission does not except the exterior walls from the scope of the lease:

> "We are of the opinion that there are no factors taking the present case out of the usual rule. It is of no consequence that Hamilburg [the lessor] reserves the right of access to the roof, or that there is no evidence that the plaintiff had any use for the outside walls. The provision precluding the placing of a sign by the plaintiff without Hamilburg's consent is, to be sure, for the benefit of the lessor. [Citation omitted]. But it is for his protection against the type of sign which might be placed by the lessee. **It did not amount to a reservation excepting the walls from the scope of the lease, nor did it restrict the lessee's rights to exclude the signs of others**."

265 Tremont Street, supra at 832 (emphasis added).

In sum, the Court of Appeals' holding on this issue is a transparent contrivance without any basis in case law or in the

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language of the lease. It is, therefore, beyond reasonable dispute that the fire originated on the leased premises. An action for trespass-nuisance cannot be sustained in these circumstances.

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REASONS FOR GRANTING LEAVE TO APPEAL

This Court should grant leave to appeal in the instant case for three reasons.

First, this case involved an issue of major significance to the jurisprudence of this State. The Court of Appeals held that tort claimants may proceed against governmental defendants on a theory of "negligent nuisance", which is nothing more than a cause of action for negligence. Because the opinion is published, it is binding on all trial courts and on all subsequent panels of the Court of Appeals.

Nor is the importance of the issue diminished by the fact that it applies only to causes of action against **municipalities** filed before April 2, 2002. That is so because the opinion has injected into the common law a negligence exception to governmental immunity which, even under Pohutski, **may be maintainable in actions against the State of Michigan**. 485 Mich at 688 n 1. A more radical expansion of the State's potential liability is difficult to imagine.

Second, for reasons set forth above, the decision conflicts with this Court's decisions in Hadfield, as well as in Rosario/Gerzeski.

Third, the instant Defendants will suffer material injustice if the instant case is reviewed by this Court only after a trial and appeal of a large verdict in the instant case. As is necessarily implied in MCR 7.202(7)(a)(v), the purpose of the govern-

mental immunity statute is to protect the government entity not only from liability, but from the trial itself. Walsh v Taylor, 263 Mich App 618, 624 (2004). Requiring Defendants to undergo a trial and a second appeal before addressing these issues would be absolutely inimical to the legislative intent in enacting the governmental immunity statute.

In short, this application presents as compelling a case for granting leave to appeal as this Court is likely to see. This Court should remedy this situation now rather than later.

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